AGROCO PLANTATION SDN BHD & ANOR *a*

v.

BESHARAPAN SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN *b*
RICHARD MALANJUM J
[ORIGINATING SUMMONS NO: S(24) 39 OF 1995]
28 AUGUST 1998

BANKRUPTCY: *Dealings in property - Undischarged bankrupt - Disposal of property - Undischarged bankrupt disposing property during bankruptcy - No intervention by official assignee - Whether transaction valid - Whether could give good title to property - Whether property divisible among creditors - Bankruptcy Act 1967, s. 24 - Sabah Land Ordinance, ss. 88, 114* *c*

BANKRUPTCY: *Official assignee - Vesting of property - Sale of property by a bankrupt - Whether transaction valid - Whether bankrupt's property automatically vested in official assignee upon bankruptcy - Whether official assignee must intervene in transactions - Whether must prove title thereto - Bankruptcy Act 1967, s. 24 - Scope and operation - Whether qualified by statutes governing title ownership of such property - Bankruptcy Act 1967, s. 24 - Sabah Land Ordinance, ss. 88, 114* *d* *e*

On 1 February 1989 the second and third defendants executed a sale and purchase agreement cum a power of attorney and by that sold a piece of land ('the subject land') to the second plaintiff ('Shamsir') for RM100,000. The second defendant was at the material time an undischarged bankrupt. The second defendant's position notwithstanding, on 15 January 1993, Shamsir sold the subject land to the first plaintiff ('Agroco') for RM185,630, and simultaneously executed a substitution under a power of attorney in favour of Agroco. *f*

Despite executing the purchase transaction in 1993, Agroco, however, only became the registered proprietor of the subject land on 15 May 1997. In the meanwhile, the second defendant, who was discharged of his bankruptcy on 21 July 1993, together with the third defendant, executed another sale and purchase agreement on 23 August 1995 and sold the subject land to the first defendant ('Besharapan'). Besharapan thereafter lodged a caveat against the subject land. *g* *h*

Agroco and Shamsir ('the plaintiffs') sought to remove Besharapan's caveat aforesaid and at the same time applied for declarations that: (i) Agroco was legally entitled to register its name on the title deed of the subject land (ii) the transaction between Besharapan and the second and third defendants in *i*

respect of the subject land was null and void; and (iii) Besharapan's interest in the subject land, if any, was subject to Agroco's interest thereon. Besharapan, the second defendant and the third defendants ('the defendants') counter-claimed, and argued in essence that the plaintiffs' action ought to be dismissed as the second defendant, being an undischarged bankrupt at the material time, was incompetent to dispose of the subject land to Shamsir, so that Shamsir could not have the power to legally transact the agreement with Agroco on 15 January 1993.

Before the learned judge, issues arose as regards: (i) the legal position of the transactions entered into between the 2nd defendant and the plaintiffs, in particular with the second plaintiff Shamsir ('the 1989 transactions'); (ii) the effect of the Bankruptcy Act 1967 ('the Act') on the 1989 transactions; (iii) the position of Agroco, particularly whether it had the power to execute the memorandum of transfer respecting the subject land on behalf of the 2nd and 3rd defendants; and (iv) the legal position of the sale and purchase agreement dated 23 August 1995 between Besharapan and the second and third defendants.

Held:

[1] As to the legal position of the 1989 transactions, the following principles are relevant, namely: (i) every beneficial interests of a bankrupt passes to the official assignee with a view to turn them to profit and to be divided among the creditors of the bankrupt; (ii) the official assignee takes no better title to property than the bankrupt himself had; (iii) the expectancy or possibility of an interest is not property divisible among the creditors of a bankrupt; (iv) the rights accruing from contracts entered into by a bankrupt pass to the official assignee unless disclaimed or rescinded, subject to the rights of other parties with whom the bankrupt has contracted and the rights of third parties arising therefrom; (v) upon the commencement of a bankruptcy which relates back to the time of the commission of the act of bankruptcy, the bankrupt can no longer validly dispose of his property or give a good title to any part of it; and (vi) s. 24(4) of the Act is to be read as qualified by any statute that governs the title ownership of such property in question.

[1a] There was no evidence here that the official assignee has intervened in the transactions during the subsistence of the bankruptcy of the 2nd defendant, and neither was the subject land hidden away from the knowledge of the official assignee. There was also no evidence that the creditors of the 2nd defendant had to accept lesser payments upon the discharge of the bankruptcy of the 2nd defendant, which they would not have to if the subject land was included. It was further obvious that the

whole purpose of the challenge by the defendants was to benefit Besharapan with whom the second and third defendants had a transaction after the discharge of the second defendant. This being the case, and in the light of the legal principles aforesaid, the contentions advanced by the defendants ought to be rejected.

[2] Bearing in mind s. 114 of the Sabah Land Ordinance ('the Ordinance') there was no automatic vesting of the subject land in the official assignee. That being so, the 1989 transactions, including the transfer of the ownership of the subject land to Agroco, would have the effect of passing the interest of the second defendant, notwithstanding his bankruptcy. Accordingly, the 1989 transactions entered into by the second defendant with the plaintiffs, in particular, the second plaintiff Shamsir, were valid.

[3] Section 88 of the Ordinance states that no new title and no dealing with claim to or interest in any land, except land held under native customary tenure without documentary title, shall be valid until it has been registered in accordance with the provisions of this part. Hence, on bankruptcy the title to the subject land cannot be said to be vested on the official assignee. It is the law that the official assignee takes no better than the 2nd defendant on his property upon bankruptcy.

[4] The primary object of bankruptcy is to enable properties of a bankrupt to be made available for the benefit of his creditors. In the case before the court, the subject land was only an expectancy and not a property divisible among the creditors because it had not been registered.

[5] In construing a document the wordings therein must be considered in the context of their use and not in isolation. In this case, although the wordings of the substitution and that of the power of attorney were not identical, the essence was there. The substitution executed by Shamsir on 15 January 1993 was therefore valid and *intra vires* the power of attorney.

[Prayers 1 & 7 of claim allowed; counterclaim dismissed.]

Case(s) referred to:

Chamber Colliery Ltd v. Twyerold [1951] 1 Ch 268 ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 CLJ 131 ***(refd)***

Grimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123 ***(refd)***

Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 ***(refd)***

Messiter v. Wollerman & Freeman [1907] 27 NZLR 589 ***(refd)***

Re Chua Tin Hong ex p Castrol (M) Sdn Bhd [1997] 3 CLJ Supp 174 ***(refd)***

State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 28(1), 48(1)(b)(i), 53(B)(1), (2), 54(1)(d), 58(i)
Contracts Act 1950, s. 24(a), (b), (e)
Evidence Act 1950, s. 114(e), (g)
Land Ordinance (Cap 68) (Sabah), ss. 88, 100, 101, 114 119

Other source(s) referred to:
Halsbury's Laws of England, 4th edn

For the plaintiffs - Majnah Abdillah; M/s Chin Lau Wong & Foo
For the defendants - Sugumar Balakrishnan; M/s Sugumar & Co

Reported by WA Sharif & Michele Saw

JUDGMENT

Richard Malanjum J:

Preliminary

The case before me began by way of an originating summons as the plaintiffs were seeking for certain declarations. However, as the matter proceeded, it was converted as though by writ action. Hence, the usual pleadings were filed by the respective parties. The defendants have also put up a counter-claim and pray for several relief.

From the statement of claim of the plaintiffs, it is obvious that it was the existence of the caveat of the 1st defendants on the subject land CL. 085311075 (the subject land) which prompted this present action. However, it is not in dispute that on 15 May 1997 the subject land was duly registered in the name of the 1st plaintiffs. Consequently, a substantial portion of the prayers sought for by the plaintiffs are no longer relevant. And this probably the reason for the learned counsel for the defendants to submit that the action of the plaintiffs should be dismissed. Learned counsel for the plaintiffs disagreed contending that the action should be maintained since there is a counter-claim and the effect of some of the declarations sought for has a bearing on the transaction between the defendants on the subject land.

Having considered the opposing contentions I am of the view that the appropriate approach to take is not to dismiss the action of the plaintiffs summarily. Rather, the relevant declarations sought for should be considered when adjudicating the counter-claim.

Undisputed Facts

The subject land measures 997 acres and situates at Sungai Ruku-Ruku, Labuk/Sugut, Sabah. And although the issued document of title in respect of the subject land was only registered on 2 September 1994, it is also indicated therein that the lease commences from 3 December 1971. The 2nd and 3rd

defendants were then the registered owners of the subject land. However, on 15 May 1997 the 1st plaintiffs became the new registered owner. Prior to the transfer there were several events that happened in connection with the subject land. One set of chronology of events which are not in dispute are as follows:

(a) On 1 February 1989 the 2nd and 3rd defendants entered into a sale and purchase agreement with the 2nd plaintiff in respect of the subject land with a consideration of RM100,000;

(b) On 1 February 1989 the 2nd and 3rd defendants also executed a power of attorney thereby appointing the 2nd plaintiff as their attorney;

(c) A supplementary agreement was also entered into between the 2nd and 3rd defendants and the 2nd plaintiff on 6 March 1989;

(d) Pursuant to his appointment as the attorney for the 2nd and 3rd defendants, the 2nd plaintiff signed the draft title of the subject land on 14 August 1989;

(e) On 15 January 1993 the 2nd plaintiff sold the subject land to the 1st plaintiffs *vide* a sale and purchase agreement on even date at the price of RM185,630;

(f) And on the same date, *ie*, 15 January 1993 the 2nd plaintiff executed a substitution under a power of attorney in favour of the 1st plaintiffs;

(the foregoing transactions are hereinafter collectively referred to as "the transactions");

(g) Upon payment of the premium to the relevant authority the title deed for the subject land was issued and registered on 16 September 1994;

(h) Upon issuance of the issued document of title the 1st plaintiffs took possession of it; and

(i) On 15 May 1997 the 1st plaintiffs finally managed to transfer the subject land to their name, having earlier on being impeded by the presence of caveat lodged by the 1st defendants against the title of the subject land. It is also pertinent to note that the 1st plaintiffs as the substitute attorney for the 2nd and 3rd defendants signed the memorandum of transfer for the transferors.

The other set of events are as follows in chronological order:

(i) On 4 October 1978 a Receiving Order and an Adjudication Order were issued upon the 2nd defendant;

(ii) But on 21 July 1993 both the receiving and adjudication orders were rescinded and annulled; and

(iii) On 23 August 1995 the 2nd and 3rd defendants entered into a sale and purchase agreement with the 1st defendants for the sale of the subject land to the latter.

It is also not in issue that on 28 January 1995 amendments were effected on the title deed of the subject land thereby allowing the planting of oil palm on the subject land instead of rubber and also to bring it under 75% cultivation by January 1993.

As stated earlier the 1st defendants lodged a caveat against the title of the subject land on 26 August 1995. The 1st plaintiffs lodged theirs on 18 September 1995. The 1st defendants renewed their caveat on 29 February 1996. Renewals for the 1st plaintiffs' caveat were done on 6 April 1996 and 21 March 1997 and thereafter the transfer. The 1st defendants failed to renew their caveat before the expiry of the first renewal.

The Claims And Counter-Claim

The plaintiffs originally sought for the following:

1) A court declaration that the Plaintiffs by virtue of the Sale and Purchase Agreement dated 15th day of January 1993 entered into with one Shamsir Bin Gandiok is legally entitled to register their name on the title deed of the land, CL 085311075;

2) A court declaration that the 1st Defendant has no longer and no caveatable interest on the said land;

3) A court declaration that the transaction between the 1st Defendant and the 2nd and 3rd Defendants in respect of the said land is null and void;

4) A court declaration that the 1st Defendant's interest (if any) on the said land is subsequent or subject to the Plaintiffs' interest thereon;

5) A court order that the 1st Defendant remove or withdraw the caveat registered against the title to the said land under Memorial No. 20227259;

6) A court order that the 1st, 2nd and 3rd Defendants be restrained whether by themselves, their servants or agents or whosoever otherwise from lodging or filing any further caveat or other encumbrances on the title to the said land and/or from hindering or obstructing in any manner whatsoever the registration of the Plaintiffs' interest thereon as declared in the order herein;

7) Costs; and

8) Such further or other reliefs as may be ordered by this Honorable Court.

However, at the outset of the hearing learned counsel for the plaintiffs applied to abandon prayer (5). And since there is no longer any caveat lodged by the 1st defendants I do not think there is any necessity to entertain prayer (6). More so when the 1st plaintiffs are now the registered owner of the subject land. The same goes for prayer (2). Hence, besides costs, in my view only prayers (1), (3) and (4) appear relevant to consider in conjunction with the counter-claim.

As for the counter-claim, the defendants seek for the following:

1. a declaration that the said Shamsir Bin Gandiok did not have the power under the Power of Attorney dated 01.02.89 to enter into the Sale and Purchase Agreement dated 15.01.93 with the Plaintiffs;

2. a declaration that the Sale and Purchase Agreement dated 15.01.93 between the said Shamsir Bin Gandiok and the Plaintiffs is invalid, null and void and of no effect;

3. a declaration that the Substitution under a Power of Attorney dated 15.01.93 is *ultra vires* the Power of Attorney dated 01.02.89 and is therefore invalid, null and void and of no effect;

4. a declaration that the Plaintiffs did not have the power or authority to execute the Memorandum of Transfer dated 17.06.95 on behalf of the 2nd and 3rd Defendants;

5. a declaration that the purported transfer of CLAUSE 085311075 registered in favour of the Plaintiffs on 15.05.97 *vide* Memorial No. 20236478 is invalid, null and void and of no effect;

6. a declaration that the Sale and Purchase Agreement entered into between the 2nd and 3rd Defendants on the one part and the 1st Defendants on the other part is valid, subsisting and enforceable;

7. an Order directing the Plaintiffs to execute a Memorandum of Transfer, and all documents incidental thereto, for the purpose of transferring CL 085311075 in favour of the 2nd and 3rd Defendants and for the Plaintiffs to deliver the duly executed Memorandum of Transfer, and all documents incidental thereto, to the advocates for the 2nd and 3rd Defendants within 14 days from the date of the Order;

8. alternatively, an Order directing the Registrar of Titles to rectify CL 085311075 pursuant to Section 119 of the Land Ordinance (Cap. 68) to remove the Plaintiffs as registered owners and to reflect the 2nd and 3rd Defendants as registered owners;

9. An Order directing the Plaintiffs to deliver the issue copy document of title of CL 085311075 to the advocates of the 2nd and 3rd Defendants within 14 days from the date of the Order;

10. Costs; and

11. Further and/or other relief as this Honourable Court deems fit to grant.

It is also to be noted that the 2nd defendant passed away before the hearing of this case. His estate is therefore represented by Puan Fatmah bt Taulani pursuant to court order of 27 August 1997.

The Issues

Having heard and considered the evidence adduced both oral and documentary and the respective submissions of learned counsel for the parties I find the following issues for determination:

(1) what is the legal position of the transactions entered into by the 2nd defendant with the plaintiffs, in particular with the 2nd plaintiff in view of the bankrupt status of the former at the material time;

(2) if the answer to (1) is in the negative, whether s. 54(1)(d) of the Bankruptcy Act 1967 ("the Act") applies to protect the plaintiffs;

(3) if the answers to (1) and (2) are positive, whether the act of the 2nd plaintiff to sell or transfer the subject land was within the ambit of the power of attorney dated 1 February 1989;

(4) whether the 1st plaintiffs had the power to execute the Memorandum of Transfer on behalf of the 2nd and 3rd defendants and to register the transfer thereof;

(5) whether the sale and purchase agreement dated 1 February 1989 and the power of attorney dated 1 February 1989 were made without consideration;

(6) whether the transfer of the subject land was permissible; and

(7) the legal position of the sale and purchase agreement dated 23 August 1995 between the 1st defendants on one hand and the 2nd and 3rd defendants on the other.

Issue (1)

(i) Contentions

It was the submission of learned counsel for the defendants that at the material time, the 2nd defendant was the beneficial co-owner of the subject land. And at that time when he concluded the deal with the 2nd plaintiff he was already an undischarged bankrupt. Further, as the 2nd defendant was still the beneficial co-owner of the subject land having only become the registered owner on 2 September 1994, in effect it was the act of the 2nd defendant when the 2nd

plaintiff entered into an agreement with the 1st plaintiffs. As such it was submitted that the 2nd defendant was incompetent in law to enter into the aforementioned transactions. Only the Official Assignee was competent to do so for the benefit of the creditors of the 2nd defendant. Sections 28(1), 48(1)(b)(i), 58(1) and 53(B)(1) and (2) of the Act were referred to.

Learned counsel for the defendants also contended that the transactions entered into by the plaintiffs pertaining to the subject land are *void ab initio* in law.

He based his argument on the fact that the 2nd defendant was an undischarged bankrupt at the material time and thus in law his assets were available in bankruptcy for the benefit of his creditors. Learned counsel also submitted that the object of the transactions was one that was implicitly forbidden or prohibited by law as the 2nd defendant was then incompetent to sell the subject land which had already vested with the Official Assignee.

Other points raised by learned counsel for the defendants on this issue (1) were:

(i) that to allow the transactions would permit the defeat of the relevant provisions of the Act;

(ii) that it would be contrary to public policy as that would be defrauding creditors of the 2nd defendant;

(iii) that these transactions were caught by s. 24(a) and/or (b) and/or (c) of the Contracts Act 1950;

(iv) that since the transactions and the documents involved thereof are void ab initio, the execution of the memorandum of transfer by the 1st plaintiffs on behalf of the 2nd and 3rd defendants and the transfer itself are also void; and

(v) that the purpose of the transactions and the instrument used are tainted with illegality.

For the plaintiffs, the approach adopted by their learned counsel are as follows:

(a) that the transactions could only be rendered invalid by the Official Assignee;

(b) that the challenge put up by the defendants is not for the benefit of the creditors of the 2nd defendant. Hence, the provisions of the Act should not be relied upon by them;

(c) that the subject land was not a kind of property that could have been realised by the Official Assignee during the commencement of the bankruptcy of the 2nd defendant. Learned counsel argued that only properties "divisible amongst creditors" come within the ambit of s. 48 of the Act. In this instant case, there was no title deed issued which could have allowed the Official Assignee to realise it. For the Official Assignee to get the title deed, premium had to be paid first. Thus, there should be no question of the subject land having automatically vested upon the Official Assignee;

(d) that the maxim "equity will not permit statute to be used as an engine of fraud" should be applied to the present case. Learned counsel contended that the 2nd defendant knew of his limitation as a bankrupt yet he consciously signed the sale and purchase agreement, the power of attorney and the supplemental agreement with the 2nd plaintiff as stated by PW3 (Mr Abdul Ghani Mat Jair). Such conduct, according to learned counsel, are unmeritorious and unconscionable;

(e) that the 2nd plaintiff should be given protection from the conduct of the 2nd and 3rd defendants; and

(f) that, at worst, only the 2nd defendant's share of the subject land should be affected by reason of his bankruptcy.

(ii) Findings

In considering this issue (1) it is appropriate to note some of the pertinent principles in bankruptcy law. Firstly, in *Halsbury's Laws of England* (4th edn.) the following are stated:

> (a) **Object of bankruptcy law**. The object of bankruptcy law is that every beneficial interest which a bankrupt has, everything belonging to him which can pass from him to his trustee and which can be turned to profit, should be divisible among his creditors.
>
> The property of the person who is adjudicated a bankrupt passes away from him on the adjudication, and becomes vested in his trustee and divisible among his creditors, with the exception (1) of property held by him in trust for any other person; (2) of the tools of his trade and the necessary wearing apparel and bedding of himself, his wife and his children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole; (3) of property which is by statute specially exempted from passing to the trustee; and (4) of property which by its nature is incapable of passing.

And note 2 of that paragraph defines the term "property" to include "money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as thus defined."

(b) **Property divisible among creditors.** The property which is divisible among the bankrupt's creditors includes:

(1) all property which belongs to or is vested in the bankrupt at the commencement of the bankruptcy, or which is acquired by or devolves on him before his discharge;

(2) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as he might have exercised for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice;

(3) all goods, which, at the commencement of the bankruptcy, are in his possession, order or disposition in his trade or business, by the consent and permission of the true owner, under such circumstances that the bankrupt is the reputed owner of the goods.

(c) **Estate or right taken by trustee.** The general rule is that the trustee in bankruptcy takes no better title to property than the bankrupt himself had. The bankrupt's property passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy.

(d) **Expectancies.** A mere expectancy or possibility of an interest is not property, and if it remains a possibility or expectancy while the bankruptcy lasts, it does not become divisible among the creditors; but if it becomes an actual interest during the bankruptcy, it is divisible among the creditors.

A possibility coupled with an interest passes on bankruptcy.

(e) **Contractual rights generally.** Rights arising out of contracts made by the bankrupt pass to the trustee, if not disclaimed or rescinded, subject to the rights of the persons with whom the bankrupt has contracted, and to the rights of third person which have been created in respect of them.

As the title of a trustee in bankruptcy relates back to the date of the first act of bankruptcy committed within the three months preceding the date of which the receiving order was made, a person who has committed an act of bankruptcy cannot, in general, either dispose of his property or give a good receipt to a debtor who pays him with notice of the act of bankruptcy. No assignment after the adjudication, even for value, of any interest of the bankrupt in such property can be of any avail against the trustee in bankruptcy or confer any rights on the assignee.

(f) **After-acquired property.** The property of the bankrupt divisible amongst his creditors includes not only property which belonged to him at the commencement of the bankruptcy, but also property which is acquired by or devolves on him before his discharge. Property acquired by or devolving on the bankrupt after his adjudication, however, stands on a different footing from property which belonged to him at or before the date of the adjudication.

Subject to the provisions of the Bankruptcy Act 1914 as to protected transactions, all property which belonged to the bankrupt at the commencement of the bankruptcy or between that time and his adjudication vests, on adjudication, in the trustee, unless it is property which he can disclaim and it is disclaimed by him, and no claim or "intervention" on the trustee's part is necessary to complete his title.

Although property which the bankrupt acquires after adjudication but before discharge vests immediately in the trustee, the bankrupt has a right to its possession until the trustee intervenes to exercise his right. Prior to such intervention, the bankrupt may dispose of the property, whether real or personal, or create valid interests in it; if, subsequently, the trustee does intervene, he takes it subject to all rights which have already been acquired by third parties from the bankrupt, *bona fide* and for value. As the bankrupt is entitled to possession until intervention, an agent who, on the bankrupt's instructions, delivers the property to another agent is not guilty of conversion, even though he knows that his principal is an undischarged bankrupt and that a sale by him is intended.

(g) Subject to exceptions, "all property which belonged to or was vested in the bankrupt at the commencement of the bankruptcy, or which may be acquired by or devolve on him before his discharge, passes to the trustee in bankruptcy. The bankruptcy (and therefore the title, on adjudication, of the trustee) is deemed to have relation back to, and to commence at, the time when the act of bankruptcy is committed on which the receiving order is made.

(h) **Effect of act of bankruptcy.** After the commencement of the bankruptcy, by virtue of the commission by the bankrupt of an act of bankruptcy, he cannot, so long as that act remains available for the presentation of a petition, validly dispose of his property, or give a good title to any part

> of it. Subject to the exceptions already considered, any payment of money or other disposition of his property made during that period by the bankrupt or by anyone on his behalf may afterwards be impeached by the trustee, or the person who made the disposition may be held liable to the trustee for the value of the property. Similarly, and subject to the same exceptions, the bankrupt is not entitled to collect in any part of his property, and cannot give a good discharge for any property so collected.

Secondly, s. 24(4) of the Act reads:

> When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.

This section has been judicially considered recently in the case of *Re Chua Tin Hong Ex-parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp. 174 where it is said that *"s. 24(4) of the Act must be interpreted as being qualified by s. 349 of the Code (National Land Code) as far as land is concerned. As s. 24(4) of the Act is subjected to the specific requirements of s. 349 of the Code it follows that the title to or interest in property of the Official Assignee which consists of land will vest and divest only on registration. ... and if the bankrupt had transferred his interest in land to some person who had registered the transfer before any transmission was registered by the Official Assignee then the bankrupt's interest would, notwithstanding his bankrupt, have passed to such person* (see *Messiter v. Wollerman & Freeman* [1907] 27 NZLR 589)." (emphasis added). It is also pertinent to note that in this aforementioned case the official assignee applied to impugn the conveyance to the subsequent purchaser of the bankrupt's property but failed.

Thirdly, in order to prevent a bankrupt from disposing of his landed property before transmission to the official assignee, caveat should be lodged against the title of the property.

In summary, therefore the principles of law are as follows:

(i) that every beneficial interests of a bankrupt passes to the official assignee with a view to turn them to profit and to be divided among the creditors of the bankrupt;

(ii) that the official assignee takes no better title to property than the bankrupt himself had;

(iii) that expectancy or possibility of an interest is not property divisible among the creditors of a bankrupt;

(iv) that rights accruing from contracts entered into by a bankrupt pass to the official assignee unless disclaimed or rescinded, subject to the rights of other parties with whom the bankrupt has contracted and the rights of third parties arising therefrom;

(v) that upon the commencement of a bankruptcy which relates back to the time of the commission of the act of bankruptcy by a bankrupt, the bankrupt can no longer validly dispose of his property or give a good title to any part of it while the act of bankruptcy remains available for the presentation of a petition; and

(vi) that s. 24(4) of the Act is to be read as qualified by any statute that governs the title ownership of such property in question.

Now, in this instant case, there was no evidence adduced that the Official Assignee did any intervention as regards the transactions at any time during the subsistence of the bankruptcy of the 2nd defendant. There was also no allegation of any sort that the subject land was hidden away from the knowledge of the official assignee. Further, there was no evidence adduced that creditors of the 2nd defendant had to accept lesser payments upon the discharge of the bankruptcy of the 2nd defendant which they would not have to if the subject land was included.

It is also quite obvious that the whole purpose of the challenge by the defendants is to benefit the 1st defendants with whom the 2nd and 3rd defendants had a transaction after the discharge of the 2nd defendant.

For the foregoing reasons alone and in the light of the principles of law outlined hereinabove I should reject the contentions advanced for the defendants.

Indeed the stand of the defendants on this issue (1) is self-defeating. If the 2nd defendant could not deal with the subject land solely by reason of his bankruptcy and regardless of whether or not there was an intervention by the Official Assignee, then there should be no question of the subject land becoming the object of the transaction between the 1st defendants and the 2nd and 3rd defendants despite the discharge of the 2nd defendant. And that should put the defendants' *locus standi* in question since going by their stand the title to the subject land would have vested to the Official Assignee and there was no evidence that it was divested upon discharge of the 2nd defendant.

The main thrust of the contention of the learned counsel for the defendants is that the 2nd defendant was incompetent to enter into the transactions with the plaintiffs by reason of his bankruptcy. Such argument was based on the premise that by virtue of s. 58(1) of the Act the subject land vested in the Official Assignee as at 4 October 1978 when the 2nd defendant became a bankrupt. But as discussed hereinabove the relevant principles of law do not support such a preposition, especially in this case when the property involved is a parcel of land. Surely the provisions of the Sabah Land Ordinance ("the Ordinance") should be considered whether at all material times the subject land

could be described as a property available and divisible among the creditors of the 2nd defendant. And even if so, whether it had vested on the Official Assignee automatically notwithstanding the provisions of the Ordinance. In my view and following the principle propounded in *Re Chua Tin Hong (supra)* there could not have been any automatic vesting since s. 114 of the Ordinance reads:

> (1) An executor or administrator or person claiming by any form of succession may become the registered owner of land by the registration as provided by sections 100 and 101 of the probate or letter of administration granted to him.
>
> (2) A trustee in bankruptcy, or receiver of an insolvent estate, or other person claiming by any order of court or act of law, may, in like manner, become the registered owner of land upon satisfactory proof of his title thereto.
>
> (3) Registration under subsection (1) or (2) of this section shall entitle the person registered to deal with the land comprised in his title as though were absolute owner, but shall in nowise be held to affect or vary his fiduciary position or his responsibility to the Court which appointed him for the due performance of his duties.

For completeness, ss. 100 and 101 read:

> 100. If the Registrar shall decide that the document presented is in order and fit for registration, he shall, in the absence of any lawful prohibition of registration thereof and on receiving payment of the prescribed fees, endorse upon the document of title and upon the issue copy or extract from the Register a brief memorial showing the nature of the dealing and date of registration and also, except in cases of satisfaction of charge and surrender of title for cancellation, exchange or sub-division, the names of the parties and hour of registration. Every such endorsement shall be made or attested by the Registrar and shall contain a reference to the memorandum on which it is based and its serial number in the Register of Memorials:
>
> Provided that if the document presented is a judgment, order or decree issuing from any Collector or any court in Sabah the Registrar may refuse registration until the expiry of the period of appeal against such judgment, order or decree.
>
> 101. An original of every such memorandum shall be filed in the Land Office in which registration takes place:
>
> Provided that if the memorandum be a judgment, order or decree issuing from any court in Sabah or in any British possession, a true copy thereof, certified by the Registrar or other official of the said court, may be accepted in place of an original.

Hence, the transactions, including the transfer of the ownership of the subject land to the 1st plaintiffs, would have the effect of passing the interest of the 2nd defendant therein notwithstanding his bankruptcy. There was no move by the Official Assignee to claim the subject land or to register any interest therein.

Further, from the evidence adduced there is no dispute that the title of the subject land was only registered on 2 September 1994. Hence, prior to that date, at best the 2nd defendant was only expecting the subject land. In short, the subject land could be described then as only an expectancy and therefore it was not a property divisible among the creditors of the 2nd defendant. And the subject land was indeed only an expectancy for certain acts and payments were required to be done to complete the alienation under the Ordinance. In fact, s. 88 of the Ordinance reads:

> No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

As such, it cannot be said that on bankruptcy the title to the subject land vested on the Official Assignee. After all it is the law that the Official Assignee takes no better title than the 2nd defendant on his property upon bankruptcy.

But there remains a question: what is the legal position of those sale and purchase agreements, power of attorney, substitution power of attorney and the supplementary agreement in view of the bankrupt status of the 2nd defendant when they were executed?

As the primary object of bankruptcy law is to enable properties of a bankrupt to be made available for the benefit of his creditors, in my view, those affected would only be those properties which are divisible among creditors. In this instant case however, I find that the subject land is not a property divisible among the creditors of the 2nd defendant for the reasons stated hereinabove. Thus, there is no reason to rule that those instruments are *void ab initio.* But as for the benefits derived by the 2nd defendant from those transactions, in particular, with the 2nd plaintiff, that should have been a matter between him and the Official Assignee. But the failure of the 2nd defendant to disclose those benefits to the Official Assignee should not be a ground to nullify the transactions.

Accordingly, it is my finding that the transactions entered into by the 2nd defendant with the plaintiffs, in particular, the 2nd plaintiff, were valid. As such the other grounds such as illegality, public policy and to defeat statutory provisions as advanced by learned counsel for the defendants, are without merit primarily by reason that the subject land was not a property divisible among creditors at the material time and even if so, the official assignee took no step to intervene at any time in order to have it vested on him.

Issue (2)

In view of my finding on issue (1) I do not think it is necessary for me to rule on this issue (2). Suffice it to say that if my finding on issue (1) is in error, then I do not think s. 54(1)(d) of the Act applies as it is not in dispute that the transactions took place while the 2nd defendant was an undischarged bankrupt.

Issues (3) and (4)

These issues involve a finding of what was actually the scope of the power of attorney dated 1 February 1989 given to the 2nd plaintiff by the 2nd and 3rd defendants and the subsequent substitution under a power of attorney dated 15 January 1993 and the actions thereof.

Learned counsel for the defendants argued that para. 7 of the power of attorney dated 1 February 1989 does not specify the subject matter. And he said that para. 8 is the more relevant paragraph. But that paragraph, he contended, did not allow the 2nd plaintiff to sell the subject land to any third party. And learned counsel therefore concluded that the sale to the 1st plaintiffs was void including the substitution under a power of attorney dated 15 January 1993 as well as the Memorandum of Transfer executed on behalf of the 2nd and 3rd defendants.

With respect, I think the contention marshalled for the defendants on this issue (3) is misconceived. It should be noted that it is a settled law that in construing a document the wordings and the provisions therein must be considered in the context of their use and not in isolation. The substance must be looked at and not just the label attached to the document. It is imperative to look beyond the terminology of the document. (See: *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 CLJ 131; [1985] 1 MLJ 285 FC; *Chamber Colliery Ltd v. Twyerold* [1951] 1 Ch. 268; *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25; [1994] 1 MLJ 405). To read therefore para. 7 of the power of attorney in isolation is not consonant with that settled principle. The other provisions should be considered, specifically cl. 5 under which para. 7 and 8 are particulars. Clause 5 reads:

> In order to fulfil our obligations under the aforesaid Agreement we hereby appoint the said SHAMSIR BIN GANDIOK to be our true and lawful attorney for us and in our names and on our behalves to do and perform and or all of the following acts, deeds and things in connection with the said Land to wit:
>
> 1. ...
> 2. ...
> 3. ...

4. ...

5. ...

6. ...

7. To sell make sign seal and as my deed deliver any deed documents in writing or Memorandum of Transfer and to do every other things whatsoever which may be necessary or proper for carrying such acts into complete effect and execution;

8 To sell and transfer effectively the said Land to our Attorney himself for his own benefit as and when our attorney deem fit or when and if the transfer thereof is permissible;

9. ...

10. To appoint and remove any substitutes for or agents of our Attorney.

As such I find no basis to say that para. 7 specifies no particular subject-matter. In my view cl. 5 has already stipulated that the subject land is the subject of those powers. It follows that the substitution under power of attorney dated 15 January 1993 is equally valid and *intra vires* the power of attorney dated 1 February 1989. The wordings may not be identical. But that is hardly relevant. The crucial matter is that the essence must be there. And I have no doubt of that in this instant case.

Accordingly under these two issues I find for the plaintiffs.

Issue (5)

Learned counsel for the defendants submitted that not an iota of evidence was adduced that the purchase price as stated in the sale and purchase agreement dated 1 February 1989 was paid. Hence, he contended that both the sale and purchase agreement and the power of attorney of even date are void. And he concluded that the subsequent transaction between the plaintiffs is void as well.

For the plaintiffs it was argued that the issue of non-payment of the purchase price was never pleaded. Further it was contended that s. 114(g) of the Evidence Act 1950 could not be relied upon by the defendants. The 2nd plaintiff had the original payment vouchers but could not tender them during the trial as the same were not in the list of documents. Finally, it was also submitted that if indeed the 2nd and 3rd defendants were not paid, they could have complained to PW3. Yet PW3 in evidence said that they never returned to him to complain on non-payment.

To consider this issue it is necessary to revert to the terms of the sale and purchase agreement dated 1 February 1989. Clause 1 therein reads:

In consideration of the terms and conditions hereinafter mentioned, the Vendors agree to sell and the Purchaser agrees to buy the said Land at the purchase price of Malaysian Ringgit One Hundred Thousand (M$100,000.00) only.

The said purchase price shall be paid as follows:

(a) Malaysian Ringgit Two Thousand (M$2,000) only on the signing of this Agreement;

(b) The final balance of Malaysian Ringgit Ninety Eight Thousand (M$98,000.00) only within sixty (60) days from the date of signing this Agreement.

PROVIDED THAT if the Purchaser fail to pay the payment mentioned under Clause 2(b) on the due date, the Vendors shall give two (2) weeks' written notice to the Purchaser to pay the same and should the Purchaser fail to pay after the expiry of the said notice, the Vendors shall be entitled to cancel this Agreement and forfeit whatever payments made by the Purchaser under this Agreement.

The proviso to that clause is crystal clear as to the recourse which the 2nd and 3rd defendants could have taken in the event of non-payment. However, there is no evidence before me that they had invoked the proviso. And after a lapse of almost nine years such an issue is raised. I think that is a little too late to do so.

And in any event the 2nd plaintiff (PW1) on one hand gave evidence that he had paid the purchase price. He attempted to show the payment vouchers in court. On the other hand the 3rd defendant (DW4) denied receiving any payment. He also took the position that the sale was only on the timber in the subject land.

Having considered these two diametrically opposite testimonies I am inclined to believe PW1. I find it difficult to accept the evidence of DW4 as he seemed to deny knowing even the contents of the sale and purchase agreement dated 1 February 1989. At the same time he said that he could only read Jawi. However, it is pertinent to note that when DW4 came to sign the documents in the office of PW3 the 2nd defendant was with him. And there was no allegation that the 2nd defendant was equally illiterate. Incidentally, the averment as to what was the subject of the transaction as between the 2nd plaintiff and the 2nd and 3rd defendants was not pursued. In fact the allegation of fraudulent misrepresentation was abandoned.

I am also inclined to agree with the learned counsel for the plaintiffs that the issue of non-payment of the purchase price was not pleaded by the defendants in their defence. And litigants are bound by their pleadings. (See: *State Government of Perak v. Muniandy* [1986] 1 MLJ 490; *Grimstern Corporation*

(M) Sdn Bhd & Anor v. Global Insurance Co Sdn. Bhd. [1987] 1 CLJ 123; [1987] 1 MLJ 302 SC). On this score as well that I am unable to accept the argument of the defendants on this Issue.

Accordingly, I find no merit in the averments advanced for the defendants under this issue (5).

Issue (6)

Under this Issue learned counsel for the defendants relied on the stipulated conditions as found in the issued document of title in respect of the subject land. His contention is that the subject land was not cultivated up to not less than 75% of its area by January 1993. Hence, he argued that the transfer should not have been allowed without prior amendment to the conditions therein. Sub-sections 24(a), (b) and (e) of the Contracts Act 1950 were also cited as a basis to say that there was an element of illegality in the transfer.

For the plaintiffs it was submitted, *inter alia*, that the Memorandum of Transfer was duly accepted by the land registry as registrable.

Further, learned counsel said that this present action is not the proper procedure upon which the defendants can ventilate their dissatisfaction over the registration of the 1st plaintiffs as the new owner of the subject land.

Now, having considered the points raised by both sides, it is my view that this may be a proper case in which the presumption under s. 114(e) of the Evidence Act 1950 should apply. There is no dispute that the registration of the 1st plaintiffs as the new owner of the subject land has been duly done. And DW1, Mr. Kevin Joibi, the Land Registrar, testified that the transfer could be accepted since the subject land had been developed. He went on to say that it "is a policy that so long the land is developed, it can be transferred". He even said that the policy prevails over the conditions of a title as regards registration and transfers. Such evidence were not contradicted by any other witnesses, let alone the fact that DW1 was the defence's witness.

Thus, I find no reason to doubt on the regularity of the transfer from the 2nd and 3rd defendants to the 1st plaintiffs. And I do not find such a presumption having been duly rebutted. In fact it was quite strange in that in the course of examining DW1, learned counsel for the defendants presented suggestive questions to him. Yet it was never indicated that DW1 should be declared a hostile witness at that point in time.

In his submission learned counsel for the defendants also argued that the testimony of DW1 should be ignored, in particular, on the issue of registration of the transfer. With respect, I cannot agree. There is no valid reason for me to do so. Definitely not if the reason is because his testimony was not favourable to the defendants who called him as a witness in the first place.

I am also in agreement with the learned counsel for the plaintiffs that for the defendants to challenge the registration of the transfer the relevant authority responsible for the registration should be given the opportunity to defend its action. In this case, other than DW1 called as a witness, nothing was shown that attempts were made to get the relevant authority to state its case.

As such I find that the contentions of the defendants on this issue lack credence in law and in fact.

Issue (7)

In view of my findings on the earlier issues, I do not think it is necessary now to make any finding on this issue (7).

Conclusion

For the reasons given hereinabove I hereby dismiss the counter-claim of the defendants. As for the claim of the plaintiffs it is sufficient that I grant only prayers (1) and (7) of the statement of claim. Costs is to be taxed unless agreed and to be paid to the plaintiffs by the defendants.